No. 15675

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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JULIA MAE THOMAS,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLEE'S BRIEF.

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### I.
### JURISDICTIONAL STATEMENT.

This is an appeal from a judgment after conviction following trial by jury under Title 21, United States Code, Section 174. Jurisdiction of this Honorable Court on appeal is conferred by virtue of the provisions of Title 28, United States Code, Section 1291 and Section 1294, and Rules 37 and 39, Federal Rules of Criminal Procedure.

### II.
### STATEMENT OF THE CASE.

In the Indictment, the grand jury charged, in effect, that after importation appellant knowingly and unlawfully sold approximately 44 grains of heroin to Justin Burley, a deputy sheriff in the Los Angeles County

Sheriff's Department. After plea of not guilty was entered, trial by jury was had on May 2 and May 3, 1957. This trial resulted in conviction of appellant of the offense alleged in the Indictment. Thereafter, on May 20, 1957, appellant was sentenced to pay a fine of $5,000 to the United States and to imprisonment for a period of twenty years. [Clk. Tr. p. 36.]

Appellant raises no issue as to the sufficiency of the evidence.

During the course of the trial, on May 2, 1957, counsel for the defense, Philip S. Schutz, Esq., suggested adjournment "at any reasonable early hour" to the court, on the ground that he was feeling poorly. Mr. Schultz did *not* move the court to adjourn any earlier than usual or customary, however. The court neither denied nor acquiesced in counsel's suggestion at that time, but reserved its decision. [Rep. Tr. p. 23, line 22, to p. 24, line 6.]

Thereafter, during the afternoon of the same day, May 2, 1957, Mr. Schultz again broached the subject of continuance on the ground of his physical condition. At this time Mr. Schultz prayed that the court grant a "three or four minute recess." This motion was *granted* and a five minute recess was had. [Rep. Tr. p. 96, line 25, to p. 97, line 18.]

A short time later, Mr. Schultz again moved the court for a continuance until the following morning. This motion was made *on the ground that Mr. Schultz contemplated changing his course of defensive action and desired added time to confer with appellant.* After some exchange between counsel and the court, *Mr. Schultz altered his request to that of a "reasonable time."* The

court then inquired if fifteen or twenty minutes would suffice. After declaring his appreciation, *Mr. Schultz then stated that fifteen minutes would be sufficient to permit him to come to a decision.* Thereafter, the court *granted* to Mr. Schultz the fifteen minute recess requested. [Rep. Tr. p. 98, line 9, to p. 102, line 5.]

It is the above course of events upon which appellant bases her appeal, claiming therein abuse of the trial court's discretion, resulting in denial to her of a fair trial.

## III.
## ARGUMENT.

### A. The Appellee Is Entitled to All Favorable Inferences Reasonably Drawn From the Record.

It is well settled in the law that the burden of showing the essential unfairness of a trial must be sustained by the appellant. Further, it must be shown not as a matter of speculation, but as a demonstrable reality. Thus, the burden of demonstrating both error and prejudice is on the appellant.

*United States ex rel. Darcy v. Handy,* 351 U. S. 454, 76 S. Ct. 965, 100 L. Ed. 1331 (1956);

*Borgia v. United States* (9 Cir. 1935), 78 F. 2d 550; cert. den. 296 U. S. 615; 56 S. Ct. 135; 80 L. Ed. 436;

*Hunt v. United States* (8 Cir. 1956), 231 F. 2d 784.

It is also the rule that Appellate Court will indulge all reasonable presumptions in support of the rulings of the trial court. In addition, it will draw all inferences permis-

sible from the record, and will consider the evidence in the light most favorable to the prosecution.

*Pasadena Research Laboratories v. United States* (9 Cir. 1948), 169 F. 2d 375; cert. den. 335 U. S. 853; 69 S. Ct. 83; 93 L. Ed. 401;

*United States v. Albanese* (2 Cir. 1955), 224 F. 2d 879; cert. den. 350 U. S. 845; 76 S. Ct. 87; 100 L. Ed. 753.

In the instant appeal appellant not only fails to carry this burden, but in fact concedes that the record itself will not suffice: ". . . a reading of the Transcript may not show, in an obvious way, that defendant did not have effective aid of counsel . . ." (App. Op. Br. p. 6.) It is this admission relative to the record that is important here. If neither the record nor appellant present this Honorable Court on appeal with any facts whatsoever to support the appeal, then appellant must fail; and particularly so where a review of the record as a whole amply substantiates the rulings of the trial court. Such is the instant case.

### B. The Constitutional Right to Counsel Is Substantial, Not Formal.

It is well established that the crux of the right to assistance of counsel granted by the Sixth Amendment to the Constitution is a matter of substance, not form.

*United States Const.,* Amend. VI.

In *United States ex rel. Marino v. Holton* (7 Cir. 1955), 227 F. 2d 886; cert. den. 380 U. S. 1006; 76 S. Ct. 650; 100 L. Ed. 868, the court said, at page 896:

"Due process of law, as we comprehend it, does not necessarily include or exclude representation by coun-

sel. The substance of due process may be denied although the accused is represented by a coterie of counsel, yet he may have it although unaccompanied by counsel. Due process, or the lack of it, is based upon substance and not form."

See also:

*Lisenba v. California,* 314 U. S. 219, 236; 62 S. Ct. 326; 86 L. Ed. 166 (1941);

*Chambers v. Florida,* 309 U. S. 227; 60 S. Ct. 321; 84 L. Ed. 716 (1940);

*Powell v. Alabama,* 287 U. S. 45; 53 S. Ct. 55; 77 L. Ed. 158 (1932).

This constitutional right of an accused to assistance of counsel has been further defined to require effective assistance, as distinguished from the mere opportunity for conferences and preparation.

*United States v. Bergamo* (3 Cir. 1946), 154 F. 2d 31;

*Beckett v. Hudspeth* (10 Cir. 1942), 131 F. 2d 195.

Under the rule requiring effective representation to satisfy the Constitution, absence of effective representation means representation so lacking in competence that it becomes the duty of the court or the prosecution to correct it.

*Diggs v. Welch* (D. C. Cir. 1945), 148 F. 2d 667; cert. den. 325 U. S. 889; 65 S. Ct. 1576; 89 L. Ed. 2002.

### C. Appellant Misconceives the Law Relative to Showing Lack of Effective Assistance.

Appellant has cited *Glasser v. United States,* 315 U. S. 60; 62 S. Ct. 457; 86 L. Ed. 680 (1941), and *United States v. Venuto* (3 Cir. 1950), 182 F. 2d 519, to support her thesis that she need make no showing to support her contention she was deprived of effective assistance of counsel. (App. Op. Br. p. 6.)

It is respectfully submitted that appellant here misconceives the law in this regard in that she has confused the *lack of effective assistance with the precise prejudice in which such lack of assistance results.* It is conceded that the exact prejudice *resulting* from a denial of effective assistance of counsel need not be shown.

*Glasser v. United States, supra;*
*United States v. Venuto, supra.*

However, these cases cannot in any way be construed to relieve the appellant of the responsibility for showing at least *some* facts which, in the circumstances, might constitute such a denial of effective assistance in the first instance.

By necessary implication, *appellant must first show she was in fact deprived of effective assistance of counsel* before she may rightfully claim excusal from showing the *exact prejudice* in which such denial *resulted.* In the instant appeal before this Honorable Court, appellant's only offering is a nice statement of the law:

> "If defendant is deprived of the effective assistance of counsel, that is sufficient for the Appellate

> Court to reverse, since it is not required that the defendant prove affirmatively the exact prejudice produced by such deprivation." (App. Op. Br. p. 6.)

This Honorable Court's attention is invited to the first word in the above statement. The word is "If". And it serves to impose a *condition precedent* to the privilege of not being required to show the exact prejudice which may have resulted from a denial of effective assistance of counsel. The condition precedent is that *appellant must first set forth facts showing she was in fact denied effective assistance of counsel.* At that point only can she stop and claim the right; only then does the right mature.

Thus, in lieu of any showing whatsoever to establish the existence *in fact* of a denial of effective assistance of counsel, appellant has substituted a bald and self-serving *assumption* which does no more than *conclude,* without foundation, the very fact in issue, to wit: whether appellant was in fact denied effective assistance of counsel. Appellee is confident that such semantic gyrations are not acceptable substitutes for fact and reason in the law. Nor will they confuse this learned and Honorable Court on appeal.

### D. The Granting of Continuances Is a Matter Within the Sound Discretion of the Trial Court.

In *Franklin v. South Carolina,* 218 U. S. 161; 30 S. Ct. 640; 54 L. Ed. 980 (1910), the court said, at page 168:

> "It is elementary that the matter of continuance rests in the sound discretion of the trial court, and its action in that respect is not ordinarily reviewable. It would take an extreme case to make the action

of the trial court in such a case a denial of due process of law."

See also:

*Neufield v. United States* (D. C. Cir. 1941), 118 F. 2d 375; cert. den. 315 U. S. 798; 62 S. Ct. 580; 86 L. Ed. 1199;

*Jones v. Green,* 168 P. 2d 418; 74 Cal. App. 2d 223 (1946).

This rule is equally applicable to the granting of continuance on the ground of the illness of counsel.

*Lias v. United States* (4 Cir. 1931), 51 F. 2d 215; cert. granted 284 U. S. 604; 52 S. Ct. 32; 76 L. Ed. 518; affirmed 284 U. S. 584; 52 S. Ct. 128; 76 L. Ed. 505.

When counsel whose illness is the ground of the motion for continuance is himself in court presenting and urging the motion, the court is authorized, in the determination of the question whether the condition of counsel is such that the interests of justice demand a postponement of the case, to take into consideration the general appearance of counsel and the mental and physical vigor displayed in counsel's presentation. *When such a motion is overruled, the Appellate Court may take into consideration what appears in the record as to the manner in which counsel conducted the case in determining whether there has been such an abuse of discretion as to require reversal of the judgment.*

*Rawlins v. State,* 124 Ga. 31; 52 S. E. 1 (1905).

In the *Rawlins* case, *supra,* the court said, at pages 11 and 12:

> "The illness of counsel contemplated by the law is such a physical condition, resulting from sickness, malady or disease, as would prevent counsel from properly attending to his duties as such. *It does not mean any mere indisposition, but indisposition of such character as to disqualify a person from the discharge of those delicate and responsible duties which devolve upon counsel in the trial of a case.* The determination of whether such an illness in fact exists as is contemplated by the law, is reposed in the trial judge before whom the motion for a continuance is made * * * If counsel who makes the motion is himself present in court, making and urging the motion in his own proper person, the judge may determine the question by the condition of counsel as it appears to him. * * * If the statement of counsel as to his condition is considered in its entirety, it is apparent that he was not ill at all within the sense of the statute * * * He was merely tired, and this condition of body and mind is not sufficient to postpone the trial of the case unless it reaches the point where mind and body are so exhausted that the duty in hand cannot be performed with justice to those to whom the duty is due * * * *But a case must not be postponed on account of the physical condition of counsel being affected by the work in the line of his profession or otherwise,* unless the physical condition brought about by the work is such that further effort would imperil his health or an attempt to perform the duty under such circumstances would result in injustice to those interested in the performance of a duty owed to them. This matter, as all matters relating to continuances of cases upon similar grounds, is addressed to the

> discretion, judgment and humanity of the trial judge, and nothing appears in the record which authorizes us to say that this discretion has been abused in the present case. While we have no doubt that the motion to continue was made in the utmost good faith, and counsel really believed at the time that he was in such * * * condition that he could not do justice to his client, still, from all that appears in the record we think, with the trial judge, that our brother was mistaken as to what was really his condition. It is apparent from the record * * * that counsel conducted this case with his usual skill and ability, and if any injustice has been done to his client it has not been made to appear." (Emphasis ours.)

In many respects the applicability of the above quotation is such that it might have come from this Honorable Court in the instant case.

It is thus clear that the sickness of counsel warranting a continuance must be bona fide, *not merely the product of the lawyer's profession, such as nervous tension,* and in any event sufficient to render counsel incapable of making a competent defense.

*Hanye v. State,* 99 Ga. 212; 25 S. E. 307 (1896).

When, however, the defendant in a criminal proceeding is represented by counsel of his own choice, and he and his counsel are heard at every stage of the proceedings, then the constitutional requirement as to assistance of counsel has been met. *It is only when the action of counsel in the presence of the court reduces the trial to a travesty on justice, that it may be considered on a question of denial of due process.* Where the record fails to show that the assistance provided in fact amounted to no representation or assistance such as would reduce the

trial to a travesty on justice, or a farce or a sham, then the defendant cannot be said to have been denied due process of law.

*Hendrickson v. Overlade* (N. D. Ind. 1955), 131 Fed. Supp. 561.

**E. Counsel's Physical Condition Was Not Such as Would Necessitate a Continuance Within the Above Rules.**

In the instant case counsel appeared at every stage of the proceedings in spite of alleged illness.

Where counsel continues to appear and represent the defendant at every stage of the proceedings, in spite of illness, then it cannot be said that the trial court abused its discretion in refusing a continuance.

*People v. Davis,* 276 P. 2d 801; 43 Cal. 2d 661 (1954); cert. den. 349 U. S. 905; 75 S. Ct. 581; 99 L. Ed. 1241.

Indicative of the actual condition of counsel is the transcript where counsel himself volunteered to continue:

> "Mr. Schutz: My inquiry was not to the case in particular, but I am not aware of your Honor's wishes regarding adjournment, but I will state to the court that *I am not feeling as well as I might* and if we could adjourn at any reasonable early hour I might be able to continue. I don't mean earlier than customary, but I should like to get away so I can help myself a little bit. I am feeling very poorly *and I will work through as long as your Honor directs me to.*
>
> The Court: Let me see how we get along.
>
> Mr. Schutz: I will do my best to get along." (Emphasis ours.) [Rep. Tr. p. 23, line 22, to p. 24, line 6.]

Appellee respectfully submits that such is not the plea of a gentleman in any way incapacitated by illness. Nor did counsel press the suggestion in any way. Indeed, counsel himself describes it most accurately as being "the result of tension and nervous strain"—the typical trademarks of a court trial, and as such the inevitable by-products of the lawyer's work in his profession. (Appendix, App. Op. Br. p. 1.)

The standard by which abuse of the trial court's discretion and the fairness of the trial in the circumstances is to be determined is not how nervous counsel may have been, but *whether he was well enough to put on a competent defense. Hanye v. State, supra.* It is a question of *capacity* and whether the representation was such as to amount to no representation at all and thus constitute a travesty on justice. *Hendrickson v. Overlade, supra.*

In the present case, however, the record makes no mention of the extent to which counsel's *capacity* or *competence* may have been impaired. At no time during the trial did counsel suggest the nature of his illness. In fact, counsel's only word on the subject was merely that he felt "he did not present his defense to the best of his normal ability." (Appendix, App. Op. Br. p. 1.) Clearly, counsel's "normal ability" is not the test, in that it may or may not bear any relation to his competence and capacity in fact.

It is finally worthy of note that, after denial of the earlier motion, counsel in fact *was granted* every continuance he asked for, namely, one of five minutes and one of twenty-five minutes. The actual durations of five and twenty-five minutes were suggested by counsel himself. [Rep. Tr. p. 96, line 25, to p. 102, line 5.]

**F. The Trial Court Did Not Err in Refusing to Grant the Original Continuance Requested by Counsel on the Ground of Illness.**

It is clear from the record before this Honorable Court on appeal that appellant has failed to make any showing as she is required to do, first, that she was in fact denied effective assistance of counsel (see Argument, App .Br. Point "A" and "C" *supra*); second, that the nature of counsel's illness was such as would incapacitate him within the established rules of law (see Argument, App. Br. Points "D" and "E" *supra*); or third, any way in which the defendant's case could have been more adequately presented.

It is not an abuse of the trial court's discretion to refuse a continuance where there is no particularization of any way in which the defense could have been more adequately presented.

*Neufield v. United States, supra.*

In the instant appeal, neither the Appellant's Opening Brief nor the record before this Honorable Court on appeal make any mention of areas for improvement of counsel's presentation. In truth and in fact, a review of the record as a whole, far from evincing any incompetence of Mr. Schutz such as would warrant reversal, shows a defense both spirited and eminently competent; and most particularly so if Mr. Schutz was not in fact feeling up to his "normal ability."

In another case involving affidavits of illness later appended to the record, the court said:

> "This affidavit is a rather remarkable document through which it is sought to accomplish a very unusual result. A careful examination of this entire record evinces no lack of ability or alertness on the

part of counsel for Hagan, either during or after the trial. * * * The record shows a careful trial and a spirited defense in the face of overwhelming proof of guilt. We think this ground should not be recognized."

*Hagan v. United States* (8 Cir. 1925), 9 F. 2d 562.

It is respectfully submitted that this comment is eminently well suited to the present appeal, and in light of the facts it is clear that appellant received a completely fair trial within the requirements of the Sixth Amendment.

## G. Appellant Ought Not Be Permitted to Raise the Objection of Lack of Effective Assistance of Counsel for the First Time on Appeal.

In a criminal proceeding the defendant cannot seemingly acquiesce in his counsel's defense of him, or lack thereof, and then, only after the trial has resulted adversely, have judgment set aside because of alleged incompetence, negligence or lack of skill of such counsel.

*Lucas v. United States* (N. D. W. Va. 1953), 114 Fed. Supp. 584.

See also:

*United States ex rel. Darcy v. Handy, supra;*

*Tompsett v. State* (6 Cir. 1944), 146 F. 2d 95; cert. den. 324 U. S. 869; 65 S. Ct. 916.

Appellee respectfully submits the above rule is and ought to be equally applicable to impairment of skill of counsel resulting from illness, where, as here, *the existence of such illness is known by the appellant.*

In the instant case it is clear that appellant well knew any infirmity from which Mr. Schutz may have been suffering, in that Mr. Schutz himself apprised her of that fact. In addition, she now relates certain observations made at the time. (Appendix, App. Ap. Br. p. 2.) Yet she said nothing in this connection at the trial.

It is respectfully submitted to this Honorable Court on appeal that in the circumstances, appellant's failure to raise the matter in the trial court constituted waiver of objection. Appellant's assertion that she was denied the right to effective assistance of counsel should properly have been presented to the trial court instead of being raised for the first time on appeal. Indeed, Title 28, U. S. C., Section 2225, expressly provides for such a hearing.

*Butzman v. United States* (6 Cir. 1953), 205 F. 2d 343; cert. den. 346 U. S. 828; 74 S. Ct. 50.

See also:

*United States v. Hayman,* 342 U. S. 205; 72 S. Ct. 236; 96 L. Ed. 232 (1952).

**H. The Trial Court Did Not Err in Refusing to Grant Continuance for Lack of Time to Prepare.**

In this regard, the only question is one of abuse of discretion in that the granting of such continuance is a matter within the sound discretion of the trial court. (See Argument, App. Br. Point "D" *supra.*)

In the appeal now before this Honorable Court there is no allegation that counsel was not granted sufficient time to prepare, such as would constitute deprivation of effective assistance. Nor is there anything in the record before this Honorable Court on appeal that would support such an allegation, had it been made.

The truth of the matter is that *counsel was, in fact, granted the continuance he requested for additional time to consult with appellant.* This continuance was for fifteen minutes and was acquiesced in as sufficient by counsel himself. [Rep. Tr. p. 98, line 9, to p. 102, line 5.]

Indeed, the only evidence even remotely relevant to this point was counsel's expression regarding a possible change of mind respecting his course, or, at very best, mild surprise. [Rep. Tr. p. 98, line 9, to p. 101, line 19.] It is respectfully submitted, however, that on the record now before this Honorable Court on appeal it is clear that not only did counsel have adequate time to prepare and consult with his client, but that he was, in fact, prepared to raise a competent defense. Surprise is no stranger to the courtroom, and counsel's desire to change his course cannot always be ground for continuance as a matter of right. There is nothing in the record before this Honorable Court on appeal that evinces any abuse of discretion in this regard by the trial court.

Indeed, appellee herself, admits that if counsel had not become ill, the trial court "would not have abused its discretion in denying appellant's motion for an early adjournment to further prepare her defense." (Argument, App. Op. B. p. 7.)

Accepting this position taken by appellant, and absent the illness as proper grounds here, there was no abuse of discretion. It is respectfully submitted that appellee has in fact shown that the illness here involved was not such as to warrant a continuance. Therefore it is clear that this issue is no more than a hollow shell. (See Argument, App. Br. Point "E".)

It thus becomes apparent that appellant's argument is in every respect without reason or substance.

## IV.

## Conclusion.

In light of the facts in the record before this Honorable Court on appeal, it seems apparent that this appeal is so lacking in merit or substance as almost to border on frivolity and sham.

Appellant offers no showing of facts which could in any way constitute denial of effective assistance of counsel such as would warrant reversal of the judgment. Appellant misconceives the law and misinterprets the facts. Appellant offers no showing of facts establishing the nature of counsel's illness as one which so incapacitated counsel as to require continuance within the established rules of law. Appellant offers no showing of facts which show any way in which counsel's defense could have been improved upon.

Appellant's sole offering is her own naked conclusion of the very fact in issue, and a reference to the fact that the "stakes ar eso high." (Argument, App. Op. Br. p. 7.) In this regard, appellee respectfully submits that the courts of law in this land are not to be likened to casinos or gambling houses. They are administered not by chance, but by fact and reason; and their object is not windfall, but is *justice,* for the lasting betterment of our land and our society.

With regard to appellant's contention that the trial court abused its discretion in refusing counsel further continuance for preparation of the defense, the record itself refutes the contention: *Counsel was in fact granted the very continuance he requested.* [Rep. Tr. p. 98, line 9, to p. 102, line 5.] Were this insufficient, appellant herself concedes that, absent the illness of counsel, there

would have been no abuse of discretion. (Argument, App. Op. Br. p. 7.) But *here* the illness of counsel was not the ground of counsel's motion. And even if it were, appellee has shown that this illness has not been shown to be such as would require reversal here. (Argument, App. Br. Point "E".)

Finally, a review of the record as a whole displays a masterful defense on the part of Mr. Schutz, in the face of overwhelming proof of guilt.

Thus, there can be no lingering doubt that the defendant did, in fact, receive "effective assistance of counsel" within the meaning of the law, and that the trial court acted properly within its discretion in its rulings on all matters of continuance.

Wherefore, appellee respectfully requests this Honorable Court to affirm the judgment below, and deny appellant's motion for a new trial.

Respectfully submitted,

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